UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONTEMPORARY CARS, INC. D/B/A)	
MERCEDES-BENZ OF ORLANDO AND)	
AUTONATION, INC.,)	
)	
) Charge Nos.	12-CA-26126
and)	12-CA-26233
)	12-CA-26306
INTERNATIONAL ASSOCIATION OF)	12-CA-26354
MACHINISTS AND AEROSPACE)	12-CA-26386
WORKERS, AFL-CIO)	12-CA-26552

RESPONDENTS CONTEMPORARY CARS, INC. D/B/A
MERCEDES-BENZ OF ORLANDO AND AUTONATION, INC.'S
OPPOSITION TO GENERAL COUNSEL'S REQUEST FOR SPECIAL
PERMISSION TO APPEAL AND APPEAL OF THE ASSOCIATE
CHIEF ADMINISTRATIVE LAW JUDGE'S ORDER GRANTING
RESPONDENTS' EMERGENCY MOTION FOR CONTINUANCE

Come now Respondents CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO ("MBO") and AUTONATION, INC. ("AutoNation" or collectively "Respondents"), by and through undersigned Counsel, and, pursuant to Section 102.26 of the Board's Rules and Regulations, as amended, hereby oppose General Counsel's Request for Special Permission to Appeal and Appeal of the Associate Chief Administrative Law Judge's Order Granting Respondents' Emergency Motion for Continuance as set forth below.

The General Counsel has requested special permission, pursuant to Section 102.26 of the Board's Rules and Regulations, as amended, to appeal the ruling of Associate Chief Administrative Law Judge Cates which continued the hearing in the instant case. The standard for review in this case requires a finding of abuse of discretion, and the burden of meeting that standard rests at all times with the moving party. *See Pueblo Sheet Metal Works*, 292 NLRB 855, n.2 (1989). In rendering his decision, however, the facts show that Judge Cates properly

acted within the full scope of his discretion. There has been no showing of clear error in this case, let alone that there is an immediate special need for fixing such error.

I. Introduction

The General Counsel argues that Judge Cates' ruling was unnecessary, harmful to a speedy resolution, and that further delay would frustrate the purpose of the Act. While the General Counsel goes on to boldly assert that the decision of the U.S. Supreme Court in *New Process Steel, L.P. v. National Labor Relations Board*, 564 U.S. 840, 2010 WL 2400089 (2010) should have no bearing on a hearing in this case, he fails to meet even the minimum threshold for obtaining special permission to appeal a decision of the highest ALJ. Disappointment over a late hearing postponement after extensive preparation falls woefully short of this threshold. *See Fluor Daniel, Inc.*, 353 NLRB No. 15 (2008) (denying the General Counsel's special appeal, finding "that the judge did not abuse his discretion"); *George Joseph Orchard Siding*, 325 NLRB 252 (1998) (finding that the General Counsel failed to establish that the judge abused his discretion). By adhering to a cautious, well-reasoned approach to a groundbreaking decision from the highest court in the land, Judge Cates was clearly operating within his discretion rather than abusing it.

Even if the General Counsel could somehow establish a basis for granting special permission to appeal under this narrow standard, his appeal must be denied on the merits. The General Counsel disingenuously suggests that a hearing may go forward while "parallel litigation" remains pending, referring to Respondents' petition before the Circuit Court of Appeals for the D.C. Circuit. The "parallel litigation" to which he refers, however, was not the

¹ Respondents note that the General Counsel has failed to file this motion "promptly" as required by Section 102.26 in that he waited until four days after the original hearing date had passed, and is essentially rehashing the same argument that was previously asserted within his failed opposition to the emergency motion for continuance.

basis for Respondents' emergency motion for continuance, nor was it the basis for Judge Cates' ruling.² Rather, the Continuance was sought and granted based upon the glaring and unprecedented dearth of any valid Board rulings in the instant case on which to premise a duty to bargain at this time, including Respondents' request for review in the underlying representation case. Simply put, there is nothing "pending" at this time, despite the numerous protestations of the General Counsel to the contrary.

It remains true that Respondent Mercedes-Benz of Orlando preserved its right to appeal by virtue of its Petition for Summary Reversal in the D.C. Circuit, which expressly made reference to this particular scenario. Even in the absence of such an argument, however, the Courts are already beginning to recognize that it would improper to enforce decisions rendered by the Board while comprised of no more than two members. *See e.g., NLRB v. Talmadge Park,* Case No. 09-2601 (2nd Cir. Jun. 23, 2010) (denying NLRB's petition for enforcement of a 2-member Board decision, without remanding the case to the Board, despite absence of a specific challenge to Board's authority to issue decision). As Judge Cates noted, there is good cause to continue the hearing in order for the Board to provide direction applicable to this case. With the very Request to which this responds, the General Counsel continues to encourage unnecessary litigation and increased expense to the detriment of the agency and in direct contravention of the Supreme Court, which is likely to result in the further expense of appellate litigation.

II. Argument

A. The Authority Cited In Support of the Underlying Request Does not Apply.

The cases cited by the General Counsel for the proposition that the hearing can proceed under these circumstances are inapposite, as the present scenario finds the parties in uncharted

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² Respondents note that they also filed a petition for writ of mandamus with the D.C. Circuit to postpone the hearing, which was subsequently withdrawn following Judge Cates' decision.

territory. Never before has the Supreme Court invalidated nearly 600 Board Orders through the issuance of a single decision. Furthermore, of those cases cited by Counsel for the General Counsel, none of them compelled an evidentiary hearing on refusal to bargain allegations in the absence of a presently valid ruling on bargaining unit certification.

For example, in *Alta Vista Regional Hospital*, 355 NLRB No. 43 (2010), the parties entered into a stipulation of facts and affirmatively agreed to waive the taking of formal testimony, which stands in stark contrast to the instant case, which involves thousands of pages of documentary evidence and a multitude of witnesses called upon to testify to allegations arising under Section 8(a)(5) of the Act, along with numerous additional allegations that by Counsel for the General Counsel's own admission are inextricably linked thereto. It is also worth noting that the respondent in *Alta Vista* did not even request a stay until after the conclusion of evidentiary proceedings. *See id.* at fn. 3.

The Board's ruling in *State Bank of India* is similarly inapposite. In that case, rulings had already been made on summary judgment motions while a certification test remained pending before the Board, as opposed to a Circuit Court of Appeals. *See* 273 NLRB 267 (1984). The Board ultimately issued two decisions in that case, one with respect to a unilateral wage increase, and the other with respect to a refusal to bargain, wherein a hearing had never taken place. *See id.*; *State Bank of India*, 273 NLRB 264 (1984).

B. Under the Circumstances, Judge Cates' Ruling Must Be Deemed a Proper Exercise of his Discretion.

In the instant case, it is Respondents Motion for Partial Summary Judgment that remains pending, as opposed to the underlying unit certification on which the present refusal to bargain

allegations are premised.³ Because the Board denied Respondent Mercedes-Benz of Orlando's Request for Review of the Region's Decision and Direction of Election at a time when it consisted of no more than two members, that certification is presently nullified by virtue of the Supreme Court's decision in *New Process Steel*.

Consequently, holding a lengthy, substantive hearing on refusal to bargain allegations that are not ripe for trial, and which presently have no prospects to form the basis for an unfair labor practice finding, would constitute an egregious waste of resources. Under these circumstances, Judge Cates' ruling appears eminently reasonable and entirely appropriate, thereby demonstrating an entirely proper exercise of his discretion..

The Board in *Alta Vista* noted that an appeal in the United States court shall not operate as a stay of the Board's order unless specifically ordered by the court. *See id.* While the D.C. Circuit in the instant case <u>did</u> order that the cases be held in abeyance pending further order of the court, the issue in the instant case does not revolve around the Circuit Court appeal of a Board order. The only plausible interpretation of the Supreme Court's *New Process Steel* ruling suggests that there is no longer any valid Board ruling to serve as a basis for imposing a bargaining obligation in this case, at least until such time as the Board itself, on remand, has had the opportunity evaluate the import and significance of the Court's ruling. Counsel for the General Counsel has since conceded that point within his Opposition to Respondent's Motion for Partial Summary Judgment.⁴ This was the basis for Respondents' Motion for Continuance. It

³ Pursuant to Section 102.24(b), once a notice to show cause has been issued following a motion for summary judgment, a hearing is normally postponed indefinitely. Accordingly, Judge Cates' decision to postpone the hearing represents the appropriate procedure under the Rules and Regulations.

⁴ Specifically, Counsel for the General Counsel closes that Opposition by stating, "The alleged Section 8(a)(5) violations set forth in the Consolidated Complaint, as amended, cannot be finally

was also the basis for Judge Cates' ruling, which expressly refers to the ambiguity of the procedural posture of the instant case.⁵ In so holding, Judge Cates made clear that he was simply taking a cautious, reasoned approach that would allow for the Board to consider "the ramifications of the Supreme Court's recent decision to the underlying related Board decision that impacts certain of the issues herein." That hardly constitutes an abuse of discretion.⁶

New Process Steel does not merely require the Board to reconsider its decision in the test of certification, as suggested by Counsel for the General Counsel. Rather, it effectively invalidates all 2-member Board decisions on the basis that they were issued without statutory authority, thereby directing the Board to arrive at an appropriate response. See New Process Steel, 564 U.S. 840, 2010 WL 2400089, *2 (2010) ("The question in this case is whether...two members may continue to exercise that delegated authority...We hold that two remaining Board members cannot exercise such authority).

As of the date of this Response, the Board has yet to offer any indication as to how it plans to handle cases such as this one. In the absence of a valid certification, the parties in the instant case are presently left with a vacuum that has yet to be filled. It is neither the place of the

decided until the underlying test of certification case has been resolved, which a simple remand by the Court of Appeals for the D.C. Circuit will not do."

⁵ Respondents note that they are in the process of submitting a FOIA request seeking any memoranda and other documents from the Board regarding any generalized plans for responding to the Supreme Court ruling. Even though no public documents have appeared, on the Board's web-site or otherwise, Respondent is now convinced that some post-New Process Steel directions must exist, based solely on the arguments contained on page 5 of Counsel for General Counsel's Request for Special Permission to Appeal; those arguments are rife with predictions of a 'revisited rubber stamp' of a newly-constituted Board.

⁶ In so holding, Judge Cates was echoing the sentiments of the Board itself. Indeed, just one day before his ruling, the Board issued a press release noting that post-*New Process Steel* issues would be decided upon remand to the Board "so that the four member Board could decide the appropriate means for further consideration and resolution."

Region, nor the Division, to fill that void. According to the Supreme Court, that responsibility has been rendered to the Board itself, which is why Judge Cates wisely chose to continue the hearing until such time as the Board has had an opportunity to formulate how it will respond. Even if a hearing under these circumstances were "permissible," as suggested by Counsel for the General Counsel, that would not render it appropriate to do so in the absence of specific direction from the Board. Ultimately, Judge Cates was clearly within his discretion to make such a determination, and there is no basis by which to overturn that determination at the present time.

C. The Policy Reasons Articulated by Counsel for the General Counsel in Support of its Request are Completely Unpersuasive.

Counsel for the General Counsel also argues that, because the parties have invested substantial amounts of time and resources in preparing for the hearing, it should immediately proceed. That, however, is precisely why it is so important to suspend the process of securing testimonial and documentary evidence on the refusal to bargain allegations until the Board has had the opportunity to issue proper guidance.

The Board's argument that Respondents will experience no prejudice if a hearing occurs immediately is simply not true. Compelling the production of nearly 10,000 pages of documents and a substantial number of witnesses to offer testimony integral to the refusal to bargain allegations would result in a waste of administrative time and resources, and severely prejudice Respondents given the massive contingency hovering above these proceedings. Respondents expressly articulated this burden in its Motion for Continuance and Motion for Partial Summary Judgment. Imposing this burden upon Respondents where the presupposition of a bargaining duty is no longer valid would frustrate the purposes of the Act far more than awaiting word from the Board, which admittedly could come at any time.

Moreover, Counsel for the General Counsel's suggestion that the ALJ can simply hear the evidence now and allow the Region to subsequently withdraw the refusal to bargain allegations should the Board subsequently conclude that Respondents had no duty to bargain is completely unavailing, and actually undermines his own position. The notion of presenting potentially irrelevant and unnecessary evidence for purposes of obtaining a contingent ruling is exactly why Respondents filed their Motion for Continuance - the parties are entitled to clarity on the issues to be litigated *prior to* the hearing. On the other hand, forcing the disgorgement of massive amounts of evidence in the hopes that the Board will at some later date agree with the Region is severely prejudicial to Respondents.

In support of his Request, Counsel for the General Counsel repeatedly argues that four of the six discharges are "inextricably intertwined" with 8(a)(5) allegations. This argument alone suggests that the hearing should be delayed until such time as the Board has had an opportunity to decide how the allegations should be processed. The suggestion that the six "discharged" employees are now entitled to a speedy hearing is disingenuous. It was the General Counsel's decision to combine these discharges with the other 8(a)(5) claims, and it remains free to deconsolidate these "relatively minor" claims from the Amended Complaint. Asserting that it is not practical to bifurcate the proceedings is not a reasonable position, as the General Counsel will have no choice but to proceed without a corresponding duty to bargain if no valid unit certification is found. If the refusal to bargain allegations are as insignificant as Counsel for the

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⁷ The Region had the ability to bring a Complaint at any time prior to March 2010, and could have sought an adverse inference rather than pursuing harassing litigation in District Court with respect to the investigative subpoena. Furthermore, Respondents have offered to settle all Complaint allegations arising under Section 8(a)(1) of the Act, but these offers were rejected. The Region's strategy in the instant case has been to carefully develop its evidence, which belies the argument now proffered that a hasty trial is necessary to protect the "discharged" employees.

General Counsel now claims, then deconsolidating them from the remaining Complaint allegations should be a rather straight-forward process.

An injudicious hearing will not eliminate uncertainty for the workforce, as argued by the General Counsel. Rather, certainty can only come once the Board has decided on a course of action following the Supreme Court's recent ruling. It is important to note that no further harm can result based on the allegations of the Amended Complaint, as Respondents have consistently taken the position that they have no duty to bargain, and there is not a single allegation of unlawful activity since November of 2009.

While Counsel for the General Counsel argues that Respondents were required to bargain even while it contested a Board order to bargain in the Court of Appeals, no valid bargaining order has issued. Respondents' actions would only have been taken "at their peril" had there been a valid certification which could be tested. Based on the holding of *New Process Steel*, there has been no authorized Certification of Election Results as of the date of this Response. Consequently, the "at your peril" standard does not apply, and would not apply again until such time as the Board has conducted a *de novo* review of the prior ruling on the Request for Review.

Granted, Respondents are unable to point to any controlling precedent that would preclude an evidentiary hearing under these circumstances; but that is only because these circumstances are entirely unprecedented. Consequently, Counsel for the General Counsel cannot point to any controlling precedent that would compel the rescheduling of a hearing under these circumstances. We are therefore left with the ruling of Judge Cates, which appears as well-reasoned today as the date on which it was issued.

To suggest that Board law calls for a hearing in this case not only flies in the face of common sense, it rejects the tenets of *New Process Steel*, in which the Supreme Court suggests

otherwise. Counsel for the General Counsel's request that a hearing immediately take place should therefore be rejected, as Judge Cates' cautionary decision calling for Board insight before prejudicially exhausting unnecessary resources fell squarely within his discretion.

WHEREFORE, Respondents pray that the General Counsel's Request for Special Permission to Appeal be denied.

Respectfully submitted this 28th day of June, 2010.

/s/ Steven M. Bernstein
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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, I e-filed the foregoing RESPONDENTS CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO AND AUTONATION, INC.'S OPPOSITION TO GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL AND APPEAL OF THE ASSOCIATE CHIEF ADMINISTRATIVE LAW JUDGE'S ORDER GRANTING RESPONDENTS' EMERGENCY MOTION FOR CONTINUANCE using the Board's e-filing system and that it was served by electronic mail on the following:

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cc: Associate Chief Judge Cates

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